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In the
Supreme Court of the United States
OCTOBER TERM, 1943

235
No. _____

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,
VS.

JESS G. READ, Insurance Commissioner for
the State of Oklahoma,
Respondent.

PETITION FOR WRIT OF CERTIORARI
AND
BRIEF IN SUPPORT THEREOF

GREAT NORTHERN LIFE INSURANCE COMPANY,

BY HENRY S. GRIFFING,

JOHN A. JOHNSON,

2701 First National Building,
Oklahoma City, Oklahoma;

✓ **HERBERT R. TEWS,**

11 So. LaSalle Street,
Chicago, Illinois,

Counsel for Petitioner.

August, 1943.

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**In the
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OCTOBER TERM, 1943

No. _____

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

vs.

**JESS G. READ, Insurance Commissioner for
the State of Oklahoma,**

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
TENTH CIRCUIT AND BRIEF IN
SUPPORT THEREOF**

*To the Honorable, the Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

I.

SUMMARY STATEMENT OF MATTERS INVOLVED

This case challenges the validity under the equal protection clause of the Fourteenth Amendment to the Federal Constitution of the Oklahoma gross premiums tax law of 1941, and is the first test of the validity of this law.

The 1941 Act*, Section 1, Chapter Ia, Title 36, page 121, Oklahoma Session Laws 1941 (36 O. S. 1941, Sec. 104), levies an annual tax of 4% upon the gross premiums collected in Oklahoma during the preceding calendar year by foreign insurance companies doing business in that state. The act is amendatory of Section 10478, Oklahoma Statutes 1931, and is substantially identical with the previous enactment except that the annual tax is increased from 2% on all premiums (less statutory deductions) to 4%. The 1941 Act provides, in substance, that foreign insurance companies doing business in Oklahoma shall make an annual report, under oath, on or before the last day of February of the total amount of gross premiums received in the state during the twelve months next preceding the first of January, shall pay an "entrance fee" as provided by Article XIX of the Constitution of Oklahoma, also pay an annual tax of 4% on the premiums reported after deductions of cancellations and dividends to policy holders, and an annual tax of \$3.00 on each agent. Penal features of the act provide for a \$500.00 fine and after sixty days' failure to make such returns and payments, a debarring from the transaction of any business in the state.

The constitutional provisions, found in Article XIX and referred to by the gross premiums tax law, provide in Section 1 that no foreign insurance company shall be permitted to do business in Oklahoma until after it has

* Printed as an appendix hereto.

complied with state laws, including collateral deposits, and agreed to pay all taxes and fees as might at any time be imposed by the Legislature; further, that a refusal to pay such taxes shall work a forfeiture of the license. The first paragraph of Section 2 provides that "until otherwise provided by law," all foreign insurance companies are required to pay to the insurance commissioner an "*entrance fee*" varying from \$25.00 per annum for a foreign livestock insurance company to \$200.00 for a foreign life insurance company. The second paragraph of Section 2 stipulates that "until otherwise provided by law, domestic companies excepted," foreign companies shall pay an "*annual tax*" of two per centum on all premiums collected in the state, and a tax of \$3.00 on each local agent.

Plaintiff is a Wisconsin corporation doing a life and health and accident insurance business (R. 13). It first entered Oklahoma, December 5, 1922, at which time the first gross premiums tax law imposing a tax of 2% pursuant to the provisions of the Oklahoma Constitution, had been in effect for thirteen years. On or before February 28, 1941, plaintiff obtained a renewal of its annual license and became authorized to conduct business in Oklahoma during the succeeding license year and until February 28, 1942. The 1941 gross premiums tax law became effective April 25, 1941, after only two months of the license period had passed and doubled the tax upon the premiums collected by foreign insurance companies during that entire current year. The foregoing

fact situation is set forth by the complaint (R. 4) and admitted by the answer (R. 12).

This suit originated on a complaint to recover from the defendant the gross premiums tax paid under protest on February 28, 1942, in order to obtain a license renewal for the license year commencing at that time, and to avoid the imposition of the penalties imposed by the taxing act.

The complaint alleges (R. 5) and the answer admits that plaintiff had obtained six thousand insurance contracts, employed and trained forty-five agents, and gathered valuable factual and medical information during its twenty years of business in Oklahoma prior to the effective date of the 1941 tax act. Pursuant to a stipulation of facts, the Judge of the United States District Court for the Western District of the State of Oklahoma found that domestic insurance companies pay no taxes in Oklahoma that are not likewise paid by plaintiff, except that domestic companies pay an annual income tax, the amount of which approximates one-twentieth of the amount said companies would pay if required to pay a 4% gross premiums tax (R. 28). Plaintiff thereby met its burden of proving the gross inequality of the taxing act. *Concordia Fire Ins. Co. v. People of the State of Illinois*, 292 U. S. 535, 78 L. ed. 1411, 54 S. Ct. 830. The court found that 3.55% of \$25,000,000.00 collected by the Oklahoma Insurance Department under the 2% taxing act had been expended for the cost of maintaining the department, and that under the 1941 act, the department expenses (and, therefore, the cost of regulat-

ing foreign insurance companies) was approximately 2% of those gross receipts.

It was also found that the Insurance Commissioner has uniformly considered the 2% gross premiums tax as being a payment for the privilege of entering Oklahoma and doing business during the calendar year preceding the tax payment, and has considered the annual license as expiring on the last day of February of each year (R. 28, 29, 30). The inference from the findings of fact is that the same interpretation was accorded the doubled tax during the ten months since its passage.

From an adverse judgment in the district court, an appeal was taken by petitioner to the Circuit Court of Appeals for the Tenth Circuit and the judgment was there affirmed on May 7, 1943 (R. 44-51). By its opinion the Circuit Court ruled:

(1) That annual licenses issued to foreign insurance companies doing business in Oklahoma expire on the last day of February next after their issue (R. 48).

(2) That the payment of the 4% gross premiums tax was for the privilege of having done business in the state during the then expiring license year and as a condition precedent to a license renewal for the ensuing year (R. 48).

(3) That since this company was only admitted to do business in Oklahoma until February 28, 1942, the state had the constitutional power to double the tax burden during that

license year and to refuse to renew the license for the succeeding year unless the tax had previously been paid (R. 49).

(4) That the decision of this Court in *Hanover Fire Insurance Co. v. Harding*, 272 U. S. 494, 71 L. ed. 372, 47 S. Ct. 179, 49 A. L. R. 713, is distinguishable, and that there was, therefore, no violation of the equal protection clause.

Petition for rehearing was denied on June 9, 1943, and on June 21, 1943, the mandate was issued to the United States District Court (R. 72). The judge of the trial court issued an order staying further proceedings and withholding the filing of the mandate on July 19, 1943, a certified copy of which order is printed in the appendix.

II.

STATEMENT OF BASIS OF JURISDICTION

It is believed that the jurisdiction of this Court to review the judgment in question is sustained by:

Section 240 of the Judicial Code as amended (Title 28, Sec. 347, Subd. [a], U. S. C. A.)

Rule 38, Section 5, Subsec. (b), Rules of the Supreme Court as amended.

III.

QUESTION PRESENTED

Correctness of the Circuit Court's decision that Oklahoma had power, despite the equal protection clause, to levy a heavily discriminatory tax on a foreign insurance company's 1941 business during the year 1941, after the

company's due admission to the state in compliance with laws then in force, and at a time when the foreign company stood on an equal plane with domestic companies, under Oklahoma law, and pending the business year already authorized.

IV.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

This case presents questions of first importance relating to the constitutionality of a form of tax drastically increased by a state legislature after a period of many years during which foreign insurance companies had built up a valuable and irreplaceable business representing the outlay of extensive capital, and those questions have not heretofore been passed upon by this Court. An authoritative decision is of pressing importance, not only to the parties to this cause, and not only to all foreign insurance companies doing business in Oklahoma, but also to the insurance business generally. The decision sought to be reviewed here is based squarely upon the merits of the constitutional issue presented and was based upon a complete stipulation of all facts.

From an economic standpoint it is obvious that a 4% tax upon the gross of a foreign company's income is prohibitively discriminatory when not shared in any respect by a few directly competing domestic insurance companies who are not required to pay even a fraction of that amount through the medium of other forms of taxes. The precedent established

by the Circuit Court's opinion is of the utmost importance to many Oklahoma insurance policyholders and in the interest of the public should be reviewed before the legislatures of various other states seek to adopt similar discriminatory laws. Aside from the novelty and importance of the issues presented, the decision below should be reviewed for the reason that it is clearly erroneous and not in accord with the principles of applicable decisions of this Court in the following cases, among others:

Hanover Fire Insurance Company v. Harding, 272 U. S. 494, 71 L. ed. 372, 47 S. Ct. 179;

Southern Railway Company v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287;

Air-way Electric Appliance Corporation v. Day, 266 U. S. 71, 69 L. ed. 169, 45 S. Ct. 12;

Concordia Fire Insurance Company v. People of the State of Illinois, 292 U. S. 535, 78 L. ed. 1411, 54 S. Ct. 830;

Quaker City Cab Company v. Commonwealth of Pennsylvania, 277 U. S. 389, 72 L. ed. 927, 48 S. Ct. 553;

St. Louis Cotton Compress Company v. State of Arkansas, 260 U. S. 346, 67 L. ed. 297, 43 S. Ct. 125;

Power Manufacturing Company v. Saunders, 274 U. S. 490, 71 L. ed. 1165, 47 S. Ct. 678;

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357.

Insofar as the decision sustains the validity of the taxing act, we submit that it should be reviewed for the additional reason that it is not in accord with the principles of

the following decision of the then 8th Circuit Court of Appeals:

Sneed v. Shaffer Oil and Refining Company, 35
Fed. (2d) 21 (C. C. A. 8th Cir., Sept., 1929).

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued from and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the 10th Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment and decree of the said United States Circuit Court of Appeals for the 10th Circuit be reversed by this Honorable Court, and that your petitioner have such other and further relief as to this Court may seem proper.

GREAT NORTHERN LIFE INSURANCE COMPANY,

BY HENRY S. GRIFFING,

JOHN A. JOHNSON,

2701 First National Bldg.,

Oklahoma City, Oklahoma;

HERBERT R. TEWS,

11 So. LaSalle Street,

Chicago, Illinois,

Counsel for Petitioner.

APPENDIX ONE

Sections 1 and 2, Chapter 1a, Title 36, Pages 121 and 122, Oklahoma Session Laws 1941 (36 O. S. 1941, page 121).

HOUSE BILL No. 353

AN ACT amending Section 10478 and Section 10479, Oklahoma Statutes 1931; providing for an annual tax of four per cent (4%) on all premiums collected in this state, with certain deductions to be paid by all foreign insurance companies doing business in the State of Oklahoma; extending the provisions of such statute to include every foreign corporation, co-partnership, association, inter-insurance exchange or individual who is a non-resident of the State of Oklahoma, doing an insurance business of any nature whatsoever; and providing for the distribution and appropriation of such taxes; and declaring an emergency.

“Be It Enacted by the People of the State of Oklahoma:

“REPORTS—GROSS PREMIUMS.

“Section 1. That Section 10478, Oklahoma Statutes of 1931 be, and is, hereby amended to read as follows:

“‘Every foreign insurance company, co-partnership, association, inter-insurance exchange or individual who is a non-resident of the State of Oklahoma, doing business in the State of Oklahoma in the execution of exchange contracts of indemnity, or as an insurance company of any nature or character whatsoever, shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January, or since the last return of such premiums was made by such company; and shall, at the same time, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of

Oklahoma, and an annual tax of four per cent (4%) on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted which tax, in addition to an annual tax of three dollars (\$3.00) on each agent, to be paid to the State Insurance Board as now provided by Section 10542, Oklahoma Statutes 1931, shall be in lieu of all other taxes or fees, and the taxes and fees of any sub-division or municipality of the state. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars (\$500.00); and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this state until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this state.

"REPORT AND DISBURSEMENT.

"Section 2. That Section 10479, Oklahoma Statutes 1931, be, and is, hereby amended to read as follows:

" "The Insurance Commissioner shall report and disburse all taxes collected under Section 1 hereof and the same are hereby appropriated as follows, to-wit:

" "(a) One-half or fifty (50%) per cent of the four (4%) per cent collected on all premiums by fire insurance companies in this state, shall be allocated and disbursed for the firemen's relief and pension fund as provided for in Sections 6110, 6111, 6112 and 6113 of the Oklahoma Statutes 1931.

" "(b) All the balance and remainder of the annual tax of four (4%) per cent provided for in Section 1 hereof shall be paid to the State Treasurer to the credit of the General Fund of the State.

" "The Insurance Commissioner shall keep an accurate record of all such funds and make an itemized statement

and furnish same to the State Auditor, as do other departments of this state. The report shall be accompanied by an affidavit of the Insurance Commissioner or the chief clerk of his office certifying to the correctness thereof. Provided that nothing herein shall be construed as repealing or affecting the provisions of Section 3744 of the Oklahoma Statutes 1931.' "

Approved April 25, 1941. Emergency.

APPENDIX TWO

"In the District Court of the United States for the Western District of Oklahoma.

"Great Northern Life Insurance Company, a Corporation, Plaintiff, vs. Jess G. Read, Insurance Commissioner for the State of Oklahoma, Defendant. — No. 1009.

"Order Staying Further Proceedings Pending Application for Writ of Certiorari to the Supreme Court of the United States.

"Upon a showing by Great Northern Life Insurance Company, plaintiff herein, of its purpose and desire to make application to the Supreme Court of the United States for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit, and a further showing that no rights of defendant will be prejudiced by an order staying further proceedings in this cause pending the filing of such application.

"It is, therefore, ordered that further proceedings in this cause be stayed and that the filing of the mandate heretofore issued be withheld pending the filing of plaintiffs application for writ of certiorari to the Supreme Court of the United States and the further prosecution of such writ, if and in the event that the same be granted.

"Bower Broadbuss,

"Judge of the United States District Court.

"O. K.

"Henry S. Griffing;

"John A. Johnson.

"By John A. Johnson,

"Attorneys for Plaintiff.

"Mac Q. Williamson,

"Attorney General of Oklahoma;

"Fred Hanson,

"Assistant Attorney General of Oklahoma.

"By Fred Hanson.

"Endorsed: Filed July 19, 1943. Theodore M. Filson,
clerk.

"Attest: A true copy of the original order.

"Theodore M. Filson, Clerk.

"By Margaret P. Blair, Deputy.

(Seal)"

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI**

**I.
STATEMENT**

The opinion of the Circuit Court of Appeals sought to be reviewed is yet unreported but is shown in the record (R. 44-51). A statement of the grounds on which the jurisdiction of this Court is invoked was placed in the petition under heading No. II and is, therefore, not repeated. In the interest of brevity no further statement of the case will be recited, since a summary statement has previously been incorporated with page references, and that statement is adopted as a part of this brief. For the sake of clarity it will be necessary to make references to admitted allegations and stipulations of fact as a part of the argument.

**II.
ASSIGNMENT OF ERROR**

The court erred in its decision holding that Oklahoma had power, despite the equal protection clause, to levy a heavily discriminatory tax on a foreign insurance company's 1941 business during the year 1941, after the company's due admission to the State in compliance with laws then in force, and at a time when the foreign company stood on an equal basis with domestic companies under Oklahoma law, and pending the business year already authorized.

III.

ARGUMENT

Synopsis of Argument

In support of the assigned error, the petitioner asserts the following propositions, to be presented and considered in order:

PROPOSITION I.

Under the Oklahoma Constitution and the taxing act, the gross premiums tax is not an entrance fee levied under the state's police power, but a general revenue producing measure imposed under the taxing power.

PROPOSITION II.

Since the 4% gross premiums tax is not a condition precedent to a license renewal, it is immaterial that the company's permission to do business expired February 28, 1942.

PROPOSITION III.

The law imposing a greater tax burden on business done during 1941, the year for which the company had previously been admitted to the state, was invalid; therefore, Oklahoma had no power to require a showing of past compliance with said law as a condition precedent to renewal of the company's license for the year 1942.

PROPOSITION IV.

Having secured the right to do business in Oklahoma on February 28, 1941, the company stood equal with all competing domestic companies, and the tax law made to apply thereafter did not conform to the equal protection clause since no substantial difference exists between foreign and competing domestic companies which would justify a classification for tax purposes.

PROPOSITION I.

Under the Oklahoma Constitution and the taxing act, the gross premiums tax is not an entrance fee levied under the state's police power, but a general revenue producing measure imposed under the taxing power.

It is conceded that Oklahoma could have constitutionally excluded foreign insurance corporations from entering its jurisdiction to do business, and the exclusion could have been arbitrary. It is also fundamental that the state may impose conditions upon the permission extended such foreign corporations, the only limitation being that the conditions required do not include a waiver or surrender of the rights secured to foreign corporations by the Constitution of the United States.

The 1941 Gross Premiums Taxing Act was passed pursuant to Sections 1 and 2 of Article XIX of the Constitution of Oklahoma, which read in part as follows:

"1. Foreign Insurance Companies—Conditions of Doing Business.

"No foreign insurance company shall be granted a license or permitted to do business in this state until it shall have complied with the laws of the state, including the deposit of such collateral or indemnity for the protection of its patrons within this state as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license.

"2. Entrance Fees—Annual Tax.

"Until otherwise provided by law, all foreign insurance companies, including surety and bond companies, doing business in the state, except fraternal insurance companies, shall pay to the Insurance Commissioner for the use of the state, an entrance fee as follows:

"Each foreign life insurance company, per annum, two hundred dollars * * *

"Until otherwise provided by law, domestic companies excepted, each insurance company, including surety and bond companies, doing business in this state, shall pay an annual tax of two per centum on all premiums collected in the state, after all cancellations are deducted, and a tax of three dollars on each local agent."

It is significant that in both the state constitutional sections and under the 1941 taxing act, the entrance fee of \$200.00 is segregated and distinct from the annual gross premiums tax. In both the Constitution and the statute the entrance fee is stated to be a definite sum. The tax which follows is not labelled as a part of the entrance fee. Only by a strained construction can the tax be tied to the entrance of the foreign company into the state. The Oklahoma Supreme Court has not construed either the constitutional provisions of the statute to determine whether the gross premiums tax is also an entrance fee levied under the state's police power or merely an annual revenue producing measure imposed under the taxing power and intended to be effective only when the foreign insurance companies indicated have been admitted to the state and after they have engaged in business.

In *New York Life Insurance Co. v. Board of County Commissioners of Oklahoma County*, 155 Okla. 247, 9 Pac. (2d) 936, the Oklahoma Court determined that the gross premiums tax was not a property tax, but a privilege tax. Constitutionality of the gross premiums tax was not involved, nor was there any determination that this tax is a condition precedent either to original entry into the state by foreign corporations or for subsequent annual renewal of the license to continue in business. This Court, although bound by the construction that the Supreme Court of Oklahoma may place upon the statute, is not bound by the characterization of the tax so far as that characterization may bear upon the question of its effect under the Federal Constitution. *Hanover Fire Insurance Company v. Harding*, 272 U. S. 494, at 511.

It is, therefore, submitted that the language of Sections 1 and 2 of Article XIX of the Oklahoma Constitution and the language of the tax act clearly indicate that the amount set forth in dollars is the entrance fee required by the state of a foreign corporation, and that the annual gross premiums tax is in no sense tied in with the requirements for entry, but rather is a privilege tax which must be justified, if at all, under the taxing power, as limited by the constitutional requirement of uniformity upon the same classes of subjects.

PROPOSITION II.

Since the 4% gross premiums tax is not a condition precedent to a license renewal, it is immaterial that the company's permission to do business expired February 28, 1942.

The Circuit Court's opinion is primarily predicated upon the decision that the license of a foreign insurance company expires on the last day of February next after its issuance; that it was, therefore, within the power of the state to change the conditions of admission at any time as to subsequent license years (R. 49). It is petitioner's position that, unless the gross premiums tax is a condition precedent to original entry into the state by a foreign corporation, it cannot be a condition precedent for any subsequent license year and is, therefore, invalid if discriminatory. Petitioner's case is rested upon the opinion of this Court in *Hanover Fire Insurance Company v. Harding*, cited *supra*.

In that opinion the decisive question was whether the Illinois net receipts tax constituted a condition precedent to the annual renewal of the license of the foreign insurance company. The Illinois Supreme Court had previously ruled that said net receipts tax was a privilege tax and not a tax on personal property, *People ex rel. City of Chicago v. Kent*, 133 N. E. 276; *People ex rel. City of Chicago v. Barrett*, 139 N. E. 903. In the *Hanover* case the Supreme Court of Illinois conceded that the net receipts tax could not be a condition precedent, since it was necessary for the company to engage in business in the state prior to the time that the tax was

paid in order that there might be a basis for computation of the tax. *Hanover Fire Insurance Company v. Carr*, 148 N. E.

23. This Court ruled that, since the net receipts tax was not a condition precedent to the annual renewal of a license, and since the company had previously complied with all actual conditions precedent, the net receipts tax was not an exercise of the state's police power.

The Oklahomā gross premiums tax is identical with the Illinois net receipts tax in that it is physically impossible for said tax to be a condition precedent to the entry of a foreign life insurance company into Oklahoma. When such a company enters a state for the first time it pays a \$200.00 entrance fee (Sections 1 and 2, Article XIX, Oklahoma Constitution). It files a copy of its charter and statement of its financial condition, and satisfies the Insurance Commissioner that it is legally organized under the laws of a foreign state and that it has on deposit with prescribed officials designated securities. It demonstrates that it has a paid up or guaranty capital or surplus of the prescribed amount, and it appoints the Insurance Commissioner as its service agent. These conditions precedent to the issuance of a license are prescribed by Section 101, Title 36, Oklahoma Statutes 1941. Upon complying with these conditions precedent to admission into the state, a license is issued. The company pays no tax upon gross premiums because it has collected no premiums in Oklahoma. Since it is absolutely impossible for the gross premiums tax to be a condition precedent to the issuance of an

original license, clearly it is not an exercise of the state's police power, and cannot be a condition precedent to any subsequent license renewal.

The Circuit Court concedes that the gross premiums tax paid at the expiration of a license year is exacted for the privilege, previously enjoyed, of having been permitted to do business in Oklahoma during the license year then expiring (R. 48). This concession confesses that the corporation has been admitted to the state and placed upon an equal basis with competing domestic corporations by complying with conditions precedent to the issuance of its license, prior to the time for payment of the gross premiums tax.

On or before February 28, 1941, this petitioner paid \$300.00 to the Insurance Commissioner of Oklahoma as its entrance fee for the license year commencing March 1, 1941, and received a license which was not to expire for a period of one year. Thereafter, the 4% gross premiums tax became effective April 25, 1941, as an emergency measure. It was applied to the entire year of 1941. It was given no prospective operation, but became effective immediately upon its passage. We agree with the Circuit Court that this tax was exacted for the privilege of doing business in Oklahoma during 1941, the year in which the tax was levied, but since it was not a condition precedent to the annual license *already issued*, it is submitted that the fact that petitioner's license to do business expired on the following February 28, 1942, is immaterial.

PROPOSITION III.

The law imposing a greater tax burden on business done during 1941, the year for which the company had previously been admitted to the state, was invalid; therefore, Oklahoma had no power, to require a showing of past compliance with said law as a condition precedent to renewal of the company's license for the year 1942.

As previously indicated, Great Northern Life Insurance Company obtained a license renewal for 1941 and was entitled to do business in Oklahoma for the entire license year expiring February 28, 1942. Although the Circuit Court opinion admits that the present tax was paid for the privilege previously enjoyed during that year, so that it could not have constituted a condition precedent to the issuance of a license long since granted, it seeks to justify the payment of the tax as a condition precedent to the renewal of the license for the year commencing March 1, 1942 (R. 51). The Illinois Supreme Court sought to apply the same justification to the Illinois net receipts tax in the Hanover case. This Court, in re-affirming *Southern Railway v. Greene*, 216 U. S. 400, said:

"In the Greene case the license was indefinite. In this case it must be renewed from year to year, but the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens" (p. 509).

The period of business permitted by Oklahoma commenced March 1, 1941, and expired February 28, 1942. For that period, Oklahoma enforced against this licensee a

gross premiums tax which was not a condition precedent to the issuance of the 1941 license. Not being a condition precedent it could only have been an exercise of the taxing power of the state. The tax was grossly discriminatory and was, therefore invalid. Oklahoma required the tax to be paid it required, as a condition precedent to the renewal, before it would renew the license for 1942, but in so doing compliance with an act which was invalid in its inception and which necessarily remained invalid; therefore, could not be a valid condition for issuance of the 1942 license.

No language better illustrates the lack of power to require payment of the 1941 tax as a condition precedent to the right to continue in business for the year 1942, than that employed in this Court's opinion in the Hanover case:

"Of course, at the end of the year for which the license has been granted, the state may in its discretion impose as a condition precedent for a renewal license past compliance with its valid laws; but that does not enable the state to make past compliance with Section 30, a condition precedent to a renewal of the license, if as we find that section violates the Fourteenth Amendment, for, as already said, while a state may forbid a foreign corporation to do business within its jurisdiction or to continue it, it may not do so by imposing on a corporation a sacrifice of its constitutional rights" (p. 514).

PROPOSITION IV.

Having secured the right to do business in Oklahoma on February 28, 1941, the company stood equal with all competing domestic companies, and the tax law made to apply thereafter did not conform to the equal protection clause since no substantial difference exists between foreign and competing domestic companies which would justify a classification for tax purposes.

Petitioner's complaint alleged that domestic insurance companies incorporated in Oklahoma are authorized by charter to write contracts of insurance identical with those of petitioner, and that such domestic corporations directly compete with petitioner (R. 6). This is admitted by the answer (R. 14) and paragraph two of the stipulation of facts further demonstrates the discrimination (R. 22). The trial court, in his conclusions of law determined that the fact that the 4% premium tax law discriminated heavily against foreign insurance companies in favor of competing domestic insurance companies and resulted in the collection of taxes greatly exceeding the expenses of operating the Oklahoma Insurance Department did not make the tax law unconstitutional under the Fourteenth Amendment (R. 33).

It is not disputed that petitioner has developed an extensive and valuable insurance business in Oklahoma during its twenty-year stay in that state; it has from year to year secured renewals of its license and has through many years past built a large good-will in the State of Oklahoma. If it has now been denied the equal protection of the laws, the

value of all of this investment may be destroyed. The protection of just such an investment was the foundation stone in this Court's opinion in the Hanover case. The Circuit Court in the present case has given these factors no consideration.

When a corporation of another state has come into the taxing state in compliance with its laws, and has therein acquired property of a fixed and permanent nature upon which it has paid all taxes levied by the state, it is not liable for a new and additional franchise tax for the privilege of doing business within the state which tax is not imposed upon domestic corporations doing business in the state of the same character as that in which the foreign corporation is itself engaged.

Southern Railway Company v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287.

The record discloses that from November 16, 1907, to December 31, 1941, the total receipts of the Oklahoma Insurance Department from the 2% tax on gross premiums of foreign insurance companies and from the annual entrance and agent fees, aggregate \$25,585,107.34, while the department's expenses during that period were \$910,107.34, or 3.55% of the total receipts. The tax rate and the total receipts, have since been doubled and expenses of the department are now no more than 2% of its gross receipts (R. 23). It is submitted that the premiums tax law is, therefore, not a measure designed to raise only sufficient revenue to enable the state to regulate foreign insurance companies and to

thereby protect its citizens as policy holders, but obviously is a revenue producing measure, and as stated by this Court in the Hanover case:

"By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign within the state, and tax laws made to apply after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the Fourteenth Amendment" (p. 515).

Doubling the annual license fee paid by foreign corporations in Oklahoma, not required of competing domestic corporations, has been held in contravention of the Fourteenth Amendment. *Sneed v. Shaffer Oil and Refining Company*, 35 Fed. (2d) 21.

While reasonable classification between corporations doing different types of business is permitted for the purpose of imposing a different rate of taxation, without doing violence to the equal protection clause, such classification must be based upon a real and substantial distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed, and a classification based solely upon the fact that corporations excluded from the operation of the tax are domestic corporations, while those embraced by the taxing act are domesticated in states other than the taxing jurisdiction, is an arbitrary selection which cannot be justified by calling it classification.

Southern Railway Company v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287;

Royster Guano Company v. Virginia, 253 U. S. 412, 64 L. ed. 989, 40 S. Ct. 560;

Hopkins v. Southern California Telephone Company, 275 U. S. 393, 72 L. ed. 329, 48 S. Ct. 180;

Quaker City Cab Company v. Pennsylvania, 277 U. S. 389, 72 L. ed. 927, 48 S. Ct. 553;

Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239, 76 L. ed. 265, 52 S. Ct. 133.

CONCLUSION

In this case there is clearly such a palpable inequality between the tax burden imposed upon foreign insurance companies in Oklahoma and the benefits received by them from the state as to amount to an arbitrary taking of their property without compensation, and there is a denial of the equal protection of the laws. It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit and thereafter reviewing and reversing said court's decision.

Respectfully submitted,

GREAT NORTHERN LIFE INSURANCE COMPANY,

BY HENRY S. GRIFFING,

JOHN A. JOHNSON,

2701 First National Building,
Oklahoma City, Oklahoma;

HERBERT R. TEWS,

11 So. LaSalle Street,
Chicago, Illinois,

Counsel for Petitioner.

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